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No. 84-156

In The

Supreme Court of the United States

October Term, 1984

MACON ASSOCIATION FOR RETARDED CITIZENS,
Appellant,

vs.

MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION,
Appellee.

On Appeal From The Supreme Court Of Georgia

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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May It Please The Court:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial Federal question.

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OPINION BELOW

This is an appeal from a decision of the Supreme Court of Georgia reproduced in its entirety in Appendix A to Appellant's Jurisdictional Statement.

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JURISDICTIONAL BASIS

The jurisdictional requirements are adequately set forth in Appellant's Jurisdictional Statement.

———o———

CONSTITUTIONAL PROVISIONS AND RESOLUTIONS

Pertinent constitutional provisions and resolutions are set forth in Appellant's Jurisdictional Statement.

———o———

STATEMENT OF THE CASE

Appellee generally concurs in the Statement of the Case set forth in Appellant's Jurisdictional Statement.

However, Appellant failed to take note of one important fact. Homes of the nature of those proposed by Appellant are excluded in Macon and Bibb County. The resolution does allow these homes in certain areas.

———o———

ARGUMENT

Appellant's argument before this Court is the same as was addressed to the Supreme Court of Georgia, and facially at least has some attractiveness: that the classification being made by the Appellee is one of distinguishing between mentally retarded versus "normal" individuals. The Supreme Court of Georgia found otherwise, appropriately utilizing the rational basis standard of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The classification has nothing to do with mental capacity.

The Equal Protection Clause does not reject any rule making body's ability to classify persons or "draw lines" in the creation and application of law, but simply guarantees that those classifications or lines will not be based upon impermissible criteria or arbitrarily used to burden a class of individuals. Here, a rational basis existed for such "line drawing".

However, in an equal protection analysis, the initial determination must be to define the actual classification being used. Here, the Appellant suggests that the line is being drawn to exclude mentally retarded individuals (actually, as the Record shows, these homes only deal with mentally retarded adults and not mentally retarded chil-

dren). However, Appellee urges that Appellant's analysis is incorrect.

As pointed out in *Nowak, Rotunda & Young, Constitutional Law, Second Edition,* 1983, a classification within a law can be established in one of three ways. The first, and the applicable method in this case, is that the classification is established on the face of the law itself. The regulation here being dealt with distinguishes between five or more unrelated adults and four or less unrelated adults. The law, by its own terms, makes the class. Appellee asserts that this is the properly established classification in this case since there is no evidence in the record that the classification is being discriminatorily applied to subclasses within the class, i.e., that more than four mentally retarded individuals are being discriminated against vis-a-vis more than four "normal" individuals. In this regard, see *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252.

A second prong of the equal protection analysis must determine the end or purpose of the legislation to determine whether persons similarly situated are being treated differently. The classification herein is a classic case of "under-inclusive" classification. The Appellee determined to draw the line between four unrelated and five unrelated individuals in defining family for the purpose of a single-family dwelling. Granted, in some fact situations, five or more unrelated individuals may live together in such a fashion as that they could be deemed a "family" under some, single-housekeeping unit definition. However, constitutionally, that is not the test. Rather, the test must be to determine whether the line which has been drawn

has a sufficient relationship to a proper governmental function. Perfection in line drawing is not necessary. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471. In fact, a mere under-inclusiveness in line drawing is not fatal. *Nixon v. Administrator of General Services*, 433 U.S. 425. Rather, the classification must bear some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202.

In this case, the legitimate public purpose for the line drawing is apparent. The concept behind residential neighborhoods, and the allowance in such neighborhoods of single-family dwellings, is one of maintenance of the residential character therein. However, a residential neighborhood would not maintain that characteristic were an apartment complex, fraternity or sorority house, or boarding house, be allowed to exist within that same neighborhood. Accordingly, it is urged that the Commission, in its legislative discretion, may determine that only up to four unrelated individuals should be allowed to live in a residential-type neighborhood so as to maintain the residential characteristics thereof.

Using this analysis, it is quite clear that a classification between four unrelated adults and five unrelated adults is neither a suspect class or a "middle tier" class, and it then becomes incumbent upon the challenger to establish an abuse of the legislative discretion. It is not the Court's function to hypothesize independently on the desirability or feasibility of possible alternative statutory schemes. *Caban v. Mohammed*, 441 U.S. 380. In this case, there is no evidence in the record to establish that the Appellee abused its legislative discretion in "line drawing" between four and five unrelated adult individuals.

Based upon the above analysis, it becomes apparent that Appellee is not discriminating against mentally retarded individuals. No more than four unrelated adults may live together in a single-family dwelling in Macon or Bibb County, regardless of their I.Q., shoe size, hair color or any other factor. Mental retardation is just one subclass of the broad class, and Appellant has failed to establish that the broad classification is constitutionally impermissible.

The Supreme Court of Georgia recognized this when it held that a group home, such as proposed by Appellant, does not constitute a permissible use, ". . . not because the inhabitants of the homes are mentally retarded, but rather because the inhabitants of the homes do not constitute [a family]. . . ." (Jurisdictional Statement, Appendix A at page six). Appellant never once addresses this issue; rather Appellant simply states that mental retardation is the classification and goes on to analyze the indicia of suspectness attached thereto. Unlike *Cleburne Living Center, Inc. v. City of Cleburne, Tex.*, 726 F. 2d 191 (5th Cir. 1984), which specifically classifies homes for the feeble-minded, the ordinance herein deals solely with the number of unrelated individuals making up a "family".

Once it is recognized that the above analysis reaches the correct conclusion, the applicability of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) becomes obvious. Both ordinances deal with delimiting the number of unrelated persons occupying one-family dwellings. The decision did not rest upon the fact that the challengers were college students, free to travel and unsupervised as they may be. No, the decision is precedent for the fact that, in drawing

numerical lines, minimum scrutiny applies. Rather than inapposite to the facts of the case sub judice, as suggested by the Appellant, *Belle Terre* is factually "on all fours".

CONCLUSION

Once the appropriate classification is recognized, it is clear that the holding below closely tracks this Court's prior decision in *Belle Terre* and therefore does not present a substantial federal question.

Respectfully submitted,

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